

respondent at the address to which a complaint may be served or such other address as may be designated in writing by the respondent; or

(3) Any other method mutually agreeable to the respondent and a representative for the OED Director.

(c) A respondent shall serve on the representative for the OED Director one copy of each paper filed with the hearing officer or the OED Director. A paper may be served on the representative for the OED Director by:

(1) Delivering a copy of the paper to the representative; or

(2) Mailing a copy of the paper by first-class mail, Priority Mail Express®, or other delivery service to an address designated in writing by the representative; or

(3) Any other method mutually agreeable to the respondent and the representative.

(d) Each paper filed in a disciplinary proceeding shall contain therein a certificate of service indicating:

(1) The date on which service was made; and

(2) The method by which service was made.

(e) The hearing officer or the USPTO Director may require that a paper be served by hand or by Priority Mail Express®.

(f) Service by mail is completed when the paper mailed in the United States is placed into the custody of the U.S. Postal Service.

[79 FR 63042, Oct. 22, 2014]

#### § 11.43 Motions.

Motions, including all prehearing motions commonly filed under the Federal Rules of Civil Procedure, shall be filed with the hearing officer. The hearing officer will determine whether replies to responses will be authorized and the time period for filing such a response. No motion shall be filed with the hearing officer unless such motion is supported by a written statement by the moving party that the moving party or attorney for the moving party has conferred with the opposing party or attorney for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach agreement. If, prior to a decision on

the motion, the parties resolve issues raised by a motion presented to the hearing officer, the parties shall promptly notify the hearing officer.

#### § 11.44 Hearings.

(a) The hearing officer shall preside over hearings in disciplinary proceedings. The hearing officer shall set the time and place for the hearing. In cases involving an incarcerated respondent, any necessary oral hearing may be held at the location of incarceration. Oral hearings will be stenographically recorded and transcribed, and the testimony of witnesses will be received under oath or affirmation. The hearing officer shall conduct the hearing as if the proceeding were subject to 5 U.S.C. 556. A copy of the transcript of the hearing shall become part of the record. A copy of the transcript shall be provided to the OED Director and the respondent at the expense of the Office.

(b) If the respondent to a disciplinary proceeding fails to appear at the hearing after a notice of hearing has been given by the hearing officer, the hearing officer may deem the respondent to have waived the right to a hearing and may proceed with the hearing in the absence of the respondent.

(c) A hearing under this section will not be open to the public except that the hearing officer may grant a request by a respondent to open his or her hearing to the public and make the record of the disciplinary proceeding available for public inspection, *provided*, a protective order is entered to exclude from public disclosure information which is privileged or confidential under applicable laws or regulations.

#### § 11.45 Amendment of pleadings.

The OED Director may, without Committee on Discipline authorization, but with the authorization of the hearing officer, amend the complaint to include additional charges based upon conduct committed before or after the complaint was filed. If amendment of the complaint is authorized, the hearing officer shall authorize amendment of the answer. Any party who would otherwise be prejudiced by

the amendment will be given reasonable opportunity to meet the allegations in the complaint or answer as amended, and the hearing officer shall make findings on any issue presented by the complaint or answer as amended.

**§§ 11.46–11.48 [Reserved]**

**§ 11.49 Burden of proof.**

In a disciplinary proceeding, the OED Director shall have the burden of proving the violation by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

**§ 11.50 Evidence.**

(a) *Rules of evidence.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings in disciplinary proceedings. However, the hearing officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* Depositions of witnesses taken pursuant to § 11.51 may be admitted as evidence.

(c) *Government documents.* Official documents, records, and papers of the Office, including, but not limited to, all papers in the file of a disciplinary investigation, are admissible without extrinsic evidence of authenticity. These documents, records, and papers may be evidenced by a copy certified as correct by an employee of the Office.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the hearing officer may authorize the withdrawal of the exhibit subject to any conditions the hearing officer deems appropriate.

(e) *Objections.* Objections to evidence will be in short form, stating the grounds of objection. Objections and rulings on objections will be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

**§ 11.51 Depositions.**

(a) Depositions for use at the hearing in lieu of personal appearance of a witness before the hearing officer may be taken by respondent or the OED Director upon a showing of good cause and

with the approval of, and under such conditions as may be deemed appropriate by, the hearing officer. Depositions may be taken upon oral or written questions, upon not less than ten days' written notice to the other party, before any officer authorized to administer an oath or affirmation in the place where the deposition is to be taken. The parties may waive the requirement of ten days' notice and depositions may then be taken of a witness at a time and place mutually agreed to by the parties. When a deposition is taken upon written questions, copies of the written questions will be served upon the other party with the notice, and copies of any written cross-questions will be served by hand or Priority Mail Express® not less than five days before the date of the taking of the deposition unless the parties mutually agree otherwise. A party on whose behalf a deposition is taken shall file a copy of a transcript of the deposition signed by a court reporter with the hearing officer and shall serve one copy upon the opposing party. Expenses for a court reporter and preparing, serving, and filing depositions shall be borne by the party at whose instance the deposition is taken. Depositions may not be taken to obtain discovery, except as provided for in paragraph (b) of this section.

(b) When the OED Director and the respondent agree in writing, a deposition of any witness who will appear voluntarily may be taken under such terms and conditions as may be mutually agreeable to the OED Director and the respondent. The deposition shall not be filed with the hearing officer and may not be admitted in evidence before the hearing officer unless he or she orders the deposition admitted in evidence. The admissibility of the deposition shall lie within the discretion of the hearing officer who may reject the deposition on any reasonable basis including the fact that demeanor is involved and that the witness should have been called to appear personally before the hearing officer.

[69 FR 35452, June 24, 2004, as amended at 79 FR 63043, Oct. 22, 2014]